No. 18-1158

IN THE

Supreme Court of the United States

JARROD TAYLOR,
Petitioner,

v.

JEFFERSON S. DUNN, Commissioner,
Alabama Department of Corrections,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....................................... ii

REPLY ARGUMENT...1

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Ex parte Apicella,
87 So. 3d 1150 (Ala. 2011) 7, 8

Gray v. Netherland,
518 U.S. 152 (1996)..2

Hyde v. State,
894 So. 2d 808 (Ala. Crim. App.
2004) 8

Ingram v. State,
103 So. 3d 86 (Ala. Crim. App. 2012) 8

Lynch v. State,
587 So. 2d 306 (Ala. 1991) 8, 9

Picard v. Connor,
404 U.S. 270 (1971)..2

Ex parte Rhone,
900 So. 2d 455 (Ala. 2004) 7

United States v. Dressler,
112 F.2d 972 (7th Cir. 1940)..................................6

REPLY ARGUMENT

The State does not contest that, during the guilt phase of Taylor's trial, it presented to the jury a duffel bag containing documents reflecting Taylor's prior felony conviction and other bad acts. The State does not contest that it did so in violation of a trial court order, its own representations to the trial court, and Alabama law. And the State does not contest that it repeatedly failed to disclose to either the court or the defense that this evidence had been presented to the jury, even when defense counsel raised the issue before the trial court.

Instead, the State argues that the State Misconduct Claim[1] is procedurally defaulted, relying upon a factual finding made for the first time by the Eleventh Circuit in denying Taylor's COA Motion. The State's reliance on that *de novo* factual finding itself demonstrates that the Circuit Court applied the incorrect standard of review by making a merits determination. And Taylor has demonstrated that, under the correct COA standard, reasonable jurists could debate whether the State Misconduct Claim is procedurally defaulted, including because the State's misconduct impeded Taylor from asserting the claim earlier.

Taylor respectfully submits that summary reversal is warranted because the Eleventh Circuit misapplied this Court's standard for issuance of a COA. Certiorari also is warranted to resolve the

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[1] Capitalized terms not otherwise defined herein have the meanings ascribed in Taylor's petition for a writ of certiorari (the "Petition" or "Pet.").

question whether, under the correct COA standard, the Eleventh Circuit erred in denying a COA.

I. Under the Correct COA Standard, the Eleventh Circuit's Denial of a COA Contravened This Court's Precedents

Reasonable jurists could debate whether the State Misconduct Claim states a constitutional violation and whether it is procedurally defaulted.

a. Reasonable Jurists Could Debate Whether the State Misconduct Claim Is Procedurally Defaulted

The State argues that the State Misconduct Claim is procedurally defaulted because Taylor knew in 1998 that the bag presented to the jury contained documents regarding his criminal history.[2] The

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[2] The State appears to conflate procedural default and exhaustion, using both terms to refer to procedural default. Brief in Opposition, *Taylor v. Dunn*, No. 18-1158, at 19-26 (Mar. 26, 2019) ("Opp."). To the extent the State is arguing that Taylor did not exhaust the State Misconduct Claim in state court, that is incorrect. "[O]nce [a] federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard v. Connor*, 404 U.S. 270, 275 (1971). As the District Court found, the State Misconduct Claim was presented to each of the State courts and therefore properly exhausted. App. 83a n.10; *see also* Dkt. 22-34 at 69 (Mobile Circuit Court); Dkt. 22-55 at 176 (same); Dkt. 22-56 (CCA); Dkt. 22-50 at 2 (same); Dkt. 22-52 (Alabama Supreme Court). Moreover, the exhaustion requirement is satisfied where, as here, the state courts found that the claim was procedurally barred. *See, e.g.*, *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996).

State's argument is contrary to the factual record[3] and at odds with this Court's precedents.

i. The Facts Underlying the State Misconduct Claim Were Not Known to Taylor Until After the CCA's Remand

The State argues that Taylor knew, or presumably knew, at the time of his 1998 trial what specific documents were contained within the bag because they were his own documents. Opp. 1, 13, 15. The State offers no record citation in support of this proposition. Nor could it, as this alleged fact is nowhere in the record. And the State even recognizes that Taylor might have forgotten the contents of the bag. *Id.* at 23.

The State also argues that Taylor knew in 1998 that a juror had stated that the jury considered documents from the bag concerning Taylor's criminal history. *Id.* at 1, 15, 17. That is not true. Trial counsel did not know that these documents were contained in the bag; only the State had that information. The record indicates that, in 1998, following Taylor's trial, trial counsel learned that a juror appeared on a radio show and revealed that "the jury was made aware of the prior criminal record of Jarrod Taylor through evidence and/or personal effects purportedly belonging to" Taylor. Dkt. 22-1 at 184. Trial counsel filed a motion for a new trial and, during the hearing on that motion, informed the court that he did not know what evidence the jurors might

[3] Although Taylor addresses only certain examples herein, he disputes much of the State's factual recitation.

have seen of Taylor's prior criminal history.[4] Dkt. 22-10 at 48-49. Trial counsel subsequently confirmed under oath that they were unaware in 1998 that the bag contained documents regarding Taylor's prior felony conviction and other bad acts. Dkt. 22-47 at 184, 186; Dkt. 22-48 at 24-25. Taylor's postconviction counsel did not learn that such documents were contained in the bag until after the CCA's 2010 remand, when the jury foreperson advised counsel of that information and, separately, Taylor was granted access to the trial exhibits, which his postconviction counsel had been attempting to review for years. Pet. 10.

The State further contends that Taylor knew the basis for the State Misconduct Claim no later than 1998, when Taylor filed the motion for a new trial. Opp. i, 2, 23. That also is not true. Taylor did not learn that there was State misconduct — *i.e.*, that the State *intentionally* presented to the jury evidence of his prior felony conviction and other bad acts — until after the CCA's remand. Following the remand, the jury foreperson advised Taylor's postconviction counsel that, after the trial, investigators from the District Attorney's Office informed the jury foreperson that the State was aware that the bag contained documents regarding Taylor's criminal history and that "the District Attorney's office had not been

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4 The State asserts that, during the hearing on Taylor's motion for a new trial, "[t]he trial court was willing to hear testimony from th[e] juror" who appeared on the radio show. Opp. 13. But the State omits from its lengthy transcript excerpt the trial judge's stated interpretation of Alabama law that such juror testimony likely would not be admissible. Dkt. 22-10 at 49.

permitted to instruct the jury to review the contents of the bag, but had provided the bag to the jury with the hopes that the jury would review its contents during the deliberations following the guilt phase of the trial." Pet. 9-10. Thus, it was only after the remand that Taylor's counsel learned that the jury was presented with evidence regarding his prior felony conviction *because of the State's intentional misconduct*. After learning of the State's misconduct — and gaining access to the trial exhibits — Taylor timely sought to amend the State Petition to allege, *inter alia*, the newly-discovered State Misconduct Claim.

ii. The State's Misconduct in Concealing the Underlying Facts of the State Misconduct Claim Constituted an External Impediment That Prevented Taylor From Earlier Raising the Claim

This Court repeatedly has held that state misconduct can constitute cause to excuse a defendant's procedural default. Pet. 28-32. The State ignores those cases. But they are directly relevant where, as here, the State repeatedly violated its obligations. The State not only intentionally and covertly presented the evidence of Taylor's prior felony conviction and other bad acts to the jury, but then concealed its misconduct from both the trial court and Taylor.

The State's misconduct continued during Taylor's direct appeal, when it yet again impeded him from learning that the jury had considered this evidence. After the bag was excluded from the appellate record, Taylor argued that, on the incomplete record, he was "unable to fully brief [the]

Court on the errors below" and the court "cannot perform its plain error review." Dkt. 22-12 at 154-55. The State responded that the exhibit "is a bag" that cannot "be copied, so [it is], logically, not included in the record," and represented that "[t]he record is sufficient for this Court to conduct its appellate review." Dkt. 22-13 at 160.

The State completely ignores this misconduct, asking the Court to penalize Taylor unfairly for not discovering the evidence underlying the claim sooner. But Taylor was entitled to "assume[] that the exhibits were what they appeared to be, and what the [State] stated them to be." *United States v. Dressler*, 112 F.2d 972, 975 (7th Cir. 1940). He similarly was entitled to assume that the State would comply with its obligations, particularly given the trial court order and the State's own representation.

iii. The State Procedural Rule Under Which the State Court Dismissed the State Misconduct Claim Was Not Adequate and Independent

The State Misconduct Claim is not procedurally defaulted because, in refusing to permit Taylor to amend the State Petition to allege the State Misconduct Claim, the State courts did not act in accordance with any firmly established and regularly followed procedural rule. Pet. 34; *see also Amicus Curiae* Brief for the Federal Defenders for the Middle District of Alabama, Inc. and the Alabama Post-Conviction Relief Project, *Taylor v. Dunn*, No. 18-1158 (Apr. 4, 2019).

Throughout Taylor's state habeas proceedings, Alabama law clearly and explicitly permitted free

amendment of a state habeas petition prior to the entry of judgment. Pet. 35. The State argues that this general policy is "not absolute" and does not apply when a case is on "limited remand" from an appellate court. Opp. 24.

First, Taylor does not argue that the policy is absolute. However, a trial court must grant leave to amend prior to the entry of judgment unless an amendment would cause "undue delay or undue prejudice to the opposing party." Pet. 35 (citing, *inter alia*, *Ex parte Rhone*, 900 So. 2d 455, 458-59 (Ala. 2004)). The State does not dispute that Taylor's proposed amendments would not have caused any such delay or prejudice.

Second, Alabama law makes clear that amendment was permitted under the circumstances of Taylor's remand.[5] In *Ex parte Apicella*, 87 So. 3d 1150 (Ala. 2011), the Alabama Supreme Court held that a judgment that has been reversed and remanded is not a final judgment, and, accordingly, that *Ex parte Rhone* — which provides that leave to amend should be freely granted — must govern consideration of an amended petition under such circumstances. *Id.* at 1154-55. That is, *Apicella* held that *Rhone* applies

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[5] The State asserts that the Mobile Circuit Court granted a motion to prohibit further amendment in 2003. Opp. 8-9. The State yet again mischaracterizes the record. That motion was granted in part and required only that Taylor obtain leave from the court to amend further, upon making a requisite showing. Dkt. 22-53 at 119. The Mobile Circuit Court, however, improperly deprived Taylor of the opportunity to make that showing, instead denying Taylor's motion to amend on the grounds that, because of the remand, it lacked jurisdiction to permit amendment. *Id.* at 166.

with full force to claims on remand. *Id.*; *see also Ingram v. State*, 103 So. 3d 86 (Ala. Crim. App. 2012) (permitting amendment on remand under *Rhone* and *Apicella*).

The State argues that Alabama's general policy of freely permitting amendment does not apply where a case is on "limited remand." Opp. 24. In *Apicella*, the Alabama Supreme Court expressly rejected the similar argument that, because the case was remanded only for a limited evidentiary hearing, the remand "did not undo the trial court's entire judgment" and "did not open the entire case to reexamination via an amended petition." 87 So. 3d at 1154. The procedural posture in Taylor's case was substantively identical to that in *Apicella*.

Moreover, the State relies on two cases — *Hyde v. State*, 894 So. 2d 808 (Ala. Crim. App. 2004), and *Lynch v. State*, 587 So. 2d 306 (Ala. 1991) — that are inapposite. In *Hyde*, the CCA remanded for the sole purpose of deciding an *in forma pauperis* motion, a determination that served as a necessary predicate to the exercise of jurisdiction and that, unlike here, did not implicate the merits of the petitioner's state habeas petition. 894 So. 2d at 809. *Hyde* does not stand for the general proposition that Alabama law does not permit amendment where a case is on a limited remand. And *Lynch* did not even involve an amendment to a state habeas petition. Rather, it involved an Alabama Supreme Court remand to the CCA with directions for it to consider the effect of a recently-decided case. After the CCA then remanded for a new trial on a different issue, the Alabama Supreme Court held that "[a] lower appellate court is not free to reconsider issues finally decided in this

Court's mandate." 587 So. 2d at 308. Here, there was no final entry of judgment and Taylor did not seek reconsideration of any issue finally decided by an appellate court.

iv. The State Courts' Refusal to Permit Taylor to Allege the State Misconduct Claim Was Manifestly Unfair

The State Misconduct Claim also is not procedurally barred because the State courts' refusal to permit Taylor to amend the State Petition to allege the claim was manifestly unfair. Pet. 37-38.

As a result of the Mobile Circuit Court's erroneous dismissal — which stalled the case and discovery for more than five years,[6] and which both the State and the State courts acknowledge was improper — Taylor was placed in a worse position than he was prior to that erroneous dismissal. The State courts should have remedied this inequity by permitting Taylor to amend the State Petition. The State does not contest this argument.

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[6] The lengthy delay was due, in part, to the State's litigating whether Theodore V. Wells, Jr., the attorney who signed the notice of appeal of the Mobile Circuit Court's erroneous dismissal of Taylor's State Petition, had been properly admitted *pro hac vice*. Contrary to the State's assertion, Opp. 9, the Alabama Supreme Court unanimously held that he had. *See* Dkt. 22-53 at 137-38.

b. Reasonable Jurists Could Debate Whether the State's Misconduct Violated Taylor's Rights to Due Process, a Fair Trial, and an Impartial Jury

The State's misconduct in intentionally presenting to the jury documents regarding Taylor's prior felony conviction and other bad acts, and then standing by silently when defense counsel raised this issue to the trial court, deprived Taylor of his constitutional rights to due process, a fair trial, and an impartial jury. Pet. 23.

Federal and state courts repeatedly have held that the presentation to the jury of evidence regarding a defendant's criminal history violates the defendant's constitutional rights. *Id.* at 24-27. The State does not dispute that the cases Taylor cites stand for this proposition. Instead, the State attempts to distinguish these decisions on "procedural and factual grounds." Opp. 22-23. It is of no moment whether these decisions — which Taylor cites to demonstrate the constitutional violations — were in different procedural postures than Taylor's. And, tellingly, these decisions found constitutional violations on less troubling facts than those here. For example, in two of the cases, the presentation to the jury of the improper criminal history evidence was unintentional. Pet. 24-26. Here, in contrast, the record demonstrates that the State knowingly presented such evidence to the jury. *Id.* at 21-22.

The State does not seriously contest that Taylor was prejudiced by the improper presentation to the jury, during the guilt phase of his trial, of evidence regarding his prior felony conviction and other bad

acts. Opp. 28. Nor could it, given the jury foreperson's admission that "the jury's decision regarding Mr. Taylor's guilt was based upon the contents of the bag." Pet. 27.

II. The Eleventh Circuit Applied an Incorrect COA Standard by Engaging in Fact Finding and Denying Taylor's State Misconduct Claim on the Merits

The Circuit Court's holding denying Taylor a COA relied upon the improper factual finding that Taylor knew which documents were in the bag. The State attempts to minimize the impropriety of the Circuit Court making this factual finding by characterizing it as a "commonsense statement." Opp. 28; *see also id.* at 2. But this was not merely a "statement" in dicta; it was the finding on which the Circuit Court based its denial of a COA. App. 2a-3a, 3a n.1. And it is not common sense that Taylor would have remembered the contents of each of the more than fifty documents inside the bag. *See* Dkt. 22-47 at 199. Nor is it common sense that Taylor would have remembered the bag's contents months after it was seized from him and held in the State's custody. Even the State concedes the possibility that Taylor might have forgotten the bag's contents. Opp. 23. These varied factual possibilities demonstrate precisely why it is inappropriate for a circuit court to make factual findings in the initial instance and why a COA is warranted.

The State also argues both that Taylor "presumably" knew what documents were in the bag and that knowledge of the bag's contents "may reasonably be imputed" to Taylor. *Id.* at 15, 23. The State offers no support for either proposition. And

they are not what the Circuit Court found. Rather, the Circuit Court relied upon its unambiguous factual findings that "Petitioner knew what documents were in the bag" and "[i]t was his bag with his documents." App 2a-3a, 3a n.1.

Finally, the State fails to address Taylor's argument that, in making these factual findings, the Circuit Court imposed upon Taylor — without legal support — obligations both to remember the contents of his seized property and to anticipate that the State would seek to introduce inadmissible evidence contained within that seized property. Pet. 19. With respect to the latter, the law is clear that Taylor in fact had no such obligation and was entitled to rely on the State to comply with the trial court order and its own representation that it would raise any bad acts evidence with the trial court before presenting it to the jury. *Id.* at 31-32.

Taylor respectfully submits that, under these circumstances, summary reversal is appropriate.

CONCLUSION

For the reasons stated in the Petition and above, the Court should grant the Petition and summarily reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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